

**COMMISSION DECISION (EU) 2016/1991****of 4 July 2016****on the measures SA.41614 — 2015/C (ex SA.33584 — 2013/C (ex 2011/NN)) implemented by the Netherlands in favour of the professional football club FC Den Bosch in 's-Hertogenbosch***(notified under document C(2016) 4089)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to Article 108(2) of the Treaty <sup>(1)</sup>,

Whereas:

**1. PROCEDURE**

- (1) In 2011, the Commission was informed by a citizen and by reports in the press that the Netherlands had implemented an aid measure for the professional football club FC Den Bosch in 's-Hertogenbosch. In 2010 and in 2011, the Commission was informed by citizens also concerning measures in favour of other professional football clubs in the Netherlands, namely Willem II in Tilburg, MVV in Maastricht, PSV in Eindhoven and NEC in Nijmegen. At the Commission's request, the Netherlands provided information on the measures concerning FC Den Bosch by letter dated 1 September 2011.
- (2) By letter dated 6 March 2013, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the measures in favour of Willem II, NEC, MVV, PSV and FC Den Bosch.
- (3) The Commission decision to initiate the procedure (hereinafter: 'the opening decision') was published in the *Official Journal of the European Union* <sup>(2)</sup>. The Commission invited interested parties to submit their comments on the measures in question.
- (4) The Netherlands submitted observations within the framework of the procedure concerning the measures in favour of FC Den Bosch by letters dated 31 May 2013 and 7 November 2013 and in a meeting held on 13 October 2014. The Commission received no comments from interested parties concerning the measures in favour of FC Den Bosch.
- (5) Following the opening decision, and in agreement with the Netherlands, the investigations for the different clubs were pursued separately. The investigation concerning FC Den Bosch was registered under the case number SA.41614.

**2. DETAILED DESCRIPTION OF THE MEASURES****2.1. Beneficiary, objective and budget**

- (6) The national football federation Koninklijke Nederlandse Voetbal Bond (hereinafter: 'KNVB') is the umbrella organisation for professional and amateur football competition. Professional football in the Netherlands is organised in a two-tier system. In the 2014/2015 season it consisted of 38 clubs, of which 18 played in the top league (*eredivisie*) and 20 in the lower league (*eerste divisie*).

<sup>(1)</sup> Commission Decision in Case SA.33584 (2013/C) (ex 2011/NN) – Netherlands aid to certain professional Dutch football clubs in 2008-2011 – Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (OJ C 116, 23.4.2013, p. 19).

<sup>(2)</sup> Cf. footnote 1.

- (7) FC Den Bosch has been playing in the lower league since 2004/2005, when it played for the last time in the Dutch top league. It has never played in a European tournament. According to the information submitted by the Netherlands, FC Den Bosch is a small enterprise; in the season 2011/2012 it had 31 employees. Its turnover and balance sheet total remained around EUR 3 million in both years. It is therefore a small enterprise<sup>(3)</sup>. The stadium that FC Den Bosch is using, is owned by the municipality of 's-Hertogenbosch (hereinafter: 'the municipality'), which receives a rent for the use by the club.
- (8) In 2010, the municipality became aware that FC Den Bosch faced severe financial difficulties, which were threatening the continuation of its licence to play professional football and even its very existence. On 30 June 2010, FC Den Bosch had a negative own equity of EUR 4,6 million; a year later the negative equity was EUR 5,4 million. As evidenced by an independent accounting company, it also had increasing losses (EUR 0,168 million in June 2009, EUR 0,612 million in June 2010 and EUR 0,744 million in June 2011), a diminishing turnover (from EUR 3,736 million to EUR 2,771 million from 2009 to 2011) and mounting debt. One of the club's creditors was the municipality, which had a subordinated claim of EUR 1,65 million.
- (9) An initiative to avoid the bankruptcy of FC Den Bosch was launched by supporters, companies and sponsors in the autumn of 2010. This initiative led to a restructuring plan to improve FC Den Bosch's financial situation and to transform it into a viable professional football club with a new legal structure, to be owned by its supporters. In June 2011, the municipality and the other creditors of the club agreed on a joint initiative to swap their loans into shares of the club. As part of the restructuring, FC Den Bosch, which had the legal status of an association (*Vereniging*), was transformed on 30 June 2011 into the limited liability company (*naamloze vennootschap*) FC Den Bosch N.V.
- (10) It was agreed that the claim of the municipality would be transformed into a shareholding of 60 % of the shares of the new limited liability company FC Den Bosch N.V. The remaining 40 % of the club's shares would be acquired by the other large creditors of the club which swapped debts for equity, but with a lower debt-share ratio than the municipality. Smaller creditors waived parts of their claims. Following this agreement among the creditors, the municipality transferred its claim for equity resulting from its loan of EUR 1,65 million for EUR 1 to the foundation *Stichting Met Heel Mijn Hart*. The foundation has been formed by supporter clubs and individual supporters of FC Den Bosch and is not pursuing any commercial activity.
- (11) The municipality also agreed to pay a sum of EUR 1,4 million for FC Den Bosch leaving the training facilities<sup>(4)</sup>, which were located on land owned by the municipality.

## 2.2. Grounds for initiating the procedure

- (12) In the opening decision, as far as the measures in favour of FC Den Bosch are concerned, the Commission arrived at the preliminary conclusion that the municipality had provided a selective advantage to FC Den Bosch with the use of State resources and had, hence, provided aid to the football club.
- (13) As regards the decision to sell the claim of EUR 1,65 million for EUR 1 to organised supporters, the Commission found that the Netherlands could not argue that the municipality acted in the way a private creditor in a similar position would have done. The Commission noted that other large creditors transformed their claims into shareholdings in the new legal structure, whereas the municipality sold its claims for nought. As regards the acquisition of the training and youth block for EUR 1,4 million, the Commission noted that this price was estimated by an outside expert as being the replacement value for the block. It doubted that the replacement value of a building is the same thing as its market price.
- (14) The Commission also took the position that aid measures to professional football clubs are likely to distort competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty.

<sup>(3)</sup> Article 2(2) of the Annex to the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, (OJ L 124, 20.5.2003, p. 36) (a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover does not exceed EUR 10 million).

<sup>(4)</sup> Located at Jan Sluyterstraat in 's-Hertogenbosch.

- (15) Regarding the compatibility of a possible aid to FC Den Bosch, the Commission noted in the opening decision that the football club had been in financial difficulties at the time the aid was awarded. In order to assess the compatibility of the aid with the Guidelines on State aid for rescuing and restructuring of firms in difficulty <sup>(5)</sup> (hereinafter: 'the Guidelines'), the Commission requested information on the compliance with all requirements set out in the Guidelines.
- (16) The Commission was notably unable to verify whether the conditions in points 34 to 37 of the Guidelines concerning the nature and fulfilment of a restructuring plan had been respected. It furthermore needed to be demonstrated that the aid had been limited to the minimum necessary, that the beneficiary itself had paid an adequate own contribution to its restructuring and that the 'one time last time' principle would be respected.

### 3. COMMENTS FROM THE NETHERLANDS

#### 3.1. Presence of State aid according to Article 107(1) of the Treaty

- (17) The Netherlands disagrees with the Commission's preliminary finding that the measures with regard to FC Den Bosch constitute State aid. In the view of the Netherlands, the municipality, having a subordinated claim on a company on the brink of bankruptcy, acted in conformity with the market economy creditor principle by waiving its claim in 2011.
- (18) According to the Netherlands, in the case of bankruptcy of FC Den Bosch, the municipality would in all likelihood not have recovered anything of its subordinated claim. In their letter dated 7 November 2013, the Netherlands also invoked the decision of the Commission concerning the Belgian company Sonaca <sup>(6)</sup>, in which it found that the swap of a public loan into equity did not constitute State aid. If FC Den Bosch had not been able to redress its financial situation in June 2011, it would have lost its licence to play professional football according to the rules of the KNVB. As regards the acquisition of the training facilities, the Netherlands argues that this acquisition took place at the value established by an external expertise, which also covered the cost of replacement for FC Den Bosch. The Netherlands claims that it acted in conformity with the Commission Communication on land sales <sup>(7)</sup> (hereinafter: 'the land sales Communication').
- (19) Alternatively, the Netherlands argues that even if the measures were to be considered as having provided a selective advantage to FC Den Bosch, they would not distort competition or affect trade between Member States. The Netherlands emphasises the weak position of FC Den Bosch in national professional football, which makes participation in competitions at European level a very unlikely event. It also considers that the Commission has failed to demonstrate that aid to FC Den Bosch would distort competition or affect trade in any of the markets mentioned in the opening decision.
- (20) As a subsidiary argument, the Netherlands states that if the measures were to be considered to constitute State aid, they would be compatible with the Guidelines and, hence, with the internal market.
- (21) FC Den Bosch was in a difficult financial situation in 2010. In 2011, it had a negative own equity with debts of EUR 5,97 million and debts of EUR 7 million, with a turnover of around EUR 3 million. The club had the creditors and debts as shown in Table 1.

Table 1

#### Creditors and debts of FC Den Bosch

| Creditors  | Loan amounts      |
|--|-------------------|
| The municipality (the balance of a loan granted in 2000) | EUR 1,65 million  |
| [...] <sup>(*)</sup>                                     | EUR 1,092 million |

<sup>(5)</sup> Communication from the Commission - Community Guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2); the application of those guidelines was prolonged by the Commission Communication concerning the prolongation of the application of the Community guidelines on State aid for rescuing and restructuring firms in difficulty of 1 October 2004 (OJ C 296, 2.10.2012, p. 3).

<sup>(6)</sup> Case SA.35131 (2013/N).

<sup>(7)</sup> Commission Communication concerning aid elements in land sales by public authorities (OJ C 209, 10.7.1997, p. 3).

<sup>(\*)</sup> Confidential information.

| Creditors          | Loan amounts      |
|--------------------|-------------------|
| [...]              | EUR 1,865 million |
| [...]              | EUR 0,73 million  |
| [...]              | EUR 0,235 million |
| A private creditor | EUR 0,3 million   |
| [...]              | EUR 0,1 million   |

- (22) The KNVB indicated that the club would lose its professional football licence if the own equity would still be negative by 30 June 2011. This would mean that the club would be relegated to amateur status.
- (23) Therefore FC Den Bosch and the KNVB elaborated in June 2011 a restructuring plan. According to the plan, the club was transformed in a limited company (NV). The (unsecured) debts of the various larger creditors were transformed into shares of the club as set out in Table 2.

Table 2

**Debt-equity-swap ratios**

| Creditor  | Loan              | Shares/percentage                                     | EUR/share |
|---|-------------------|---|-----------|
| The municipality/foundation <i>Stichting Met Heel Mijn Hart</i> | EUR 1,65 million  | 61 900/54,3   | 26,7      |
| [...]   | EUR 1,092 million | 20 492/18   | 53,3      |
| [...]   | EUR 1,865 million | 27 925/24,5<br>11 000 thereof are preferential shares | 66,8      |
| [...]   | EUR 0,73 million  | 3 583/3,1   | 203,7     |

- (24) The remaining 0,1 % of the shares was distributed to senior members of the football club. This shows that the municipality negotiated to receive 54 % of the shares in the club for a share of 38 % in the debts of the club.
- (25) Furthermore, a commercial loan of EUR 100 000 was supported by a guarantee from a third party; other private parties provided fresh capital of EUR 300 000. A short term loan of EUR 250 000 was transformed into a long term loan. The debts to the municipal stadium operating company BIM for stadium rent are secured by a right of BIM to seize TV transmission rights income.
- (26) The municipality considered its loan of EUR 1,65 million as non-recoverable. Already in the 2010 budget of the municipality the loan was marked as non-recoverable because FC Den Bosch did not make payments anymore on it. In June 2011, the municipality asked the accounting company Ernst & Young, which had analysed the financial situation of FC Den Bosch already in February and March 2011, to assess the recoverability of the loan to FC Den Bosch. It found that for the coming years, one could not reasonably expect a repayment of the loan or payments of interest, even if the club was restructured due to the waiving of the long term debts by its larger creditors. This finding makes also sense if one considers that the club has no real estate property or machinery which could be sold or liquidated for repaying debts.

- (27) The municipality decided in the context of the agreement between the creditors to transfer its claim for 54 % of the shares for EUR 1 to the foundation *Met Heel Mijn Hart*. By doing so, the foundation became shareholder of the club — instead of the municipality which expressed no interest in being involved in the management of the club - in the same way as the other large creditors, and as agreed with them and the municipality in the restructuring agreement. The foundation will sell on the basis of these shares certificates for EUR 100.
- (28) Compared to the other creditors, the particular, greater interest of the municipality in avoiding a liquidation of the club or its relegation to amateur status was that it would lose, at least for some time, the principal user and rent fee payer of its stadium. In that respect it was in the economic interest of the municipality to have the club to continue playing professional football.
- (29) Regarding the ground under the training complex, an area of 36 000 m<sup>2</sup>, the information submitted by the Netherlands shows that the ground was already owned by the municipality. It was in use by FC Den Bosch, which had constructed the sport complex with buildings and sport fields at its own expense in the year 2000 and modified in 2006 and 2007. There was no long leasehold (*erfpacht*) <sup>(8)</sup> between the municipality and FC Den Bosch. The municipality could realise on this property the building of houses and apartments. Therefore it had in any case an interest for the club to leave the premises and seized the opportunity opened by the liquidity needs of the club. Therefore it intended to compensate the club for the vacation of the premises like in the case of an uncontested expropriation of buildings and asked for a valuation of the buildings and installations on the ground on the basis of the Dutch law on expropriations for such a case.
- (30) This price for the acquisition was determined by a valuation of the sport complex by an independent acknowledged land taxation expert. The valuation was based on the adjusted replacement value, which is described as the amount necessary to obtain objects of the same value in terms of type, quality, state and age. This amount is therefore not just the value of the sport complex in its given size. It is adjusted according to its technical state and its age. Such valuation is imposed by Article 40b, paragraph 3 of the Dutch expropriation law (*Onteigeningswet*) for cases of consensual expropriation, which was, according to the Netherlands, applicable to the situation at hand. Therefore, the Netherlands considers that the Commission was not correct in considering that the valuation report referred just to the replacement value as basis for the valuation. In the Dutch valuation practice, unconventional objects, like churches, monuments, or sport complexes, are valued at the adjusted replacement value, described as the price an independent buyer would be willing to pay for in the case of an expropriation or relocation of the actual owner.
- (31) Regarding the Commission's observation that the value determined by the valuation was higher than the book value in the accounts of FC Den Bosch, the Netherlands states that the book value of a piece of land or buildings is usually not reflecting its actual market value. It is determined by various other factors than its value in a commercial transaction, like the historical acquisition price or the depreciation.
- (32) The club continued its training activities elsewhere, in the stadium and in another football training complex in the town which still had spare capacity. The Netherlands argues that the price of the training complex was determined without regard to the possible financing needs of FC Den Bosch. A part of the amount received for leaving its training complex was used by the club to accommodate the alternative training facilities. This income was also used to pay the stadium rent debts to BIM.

### 3.2. Compatibility of the State aid under Article 107(3)(c) of the Treaty

- (33) Alternatively, the Netherlands argued that even if the measure were to constitute aid, it would be compatible with the internal market. Regarding the restructuring of FC Den Bosch, the Netherlands described the financial situation of the club as set out in recital 8.
- (34) Each Dutch professional football club needs a licence from the KNVB, which it receives only if it complies with various obligations. One of the obligations under the system relates to the financial health of the club. If it is insufficient, the KNVB may withdraw the licence. If a successor club is founded, it would not be admitted to the professional football leagues directly, but it would have to start in the second-highest amateur league. With its difficulties, Den Bosch risked to lose its licence to participate in professional competitions.

<sup>(8)</sup> Under Article 5:85 of the Dutch Civil Code, *erfpacht* (long leasehold) is a limited property right which gives its proprietor, the 'leaseholder', the right to hold and use an immovable thing of someone else.

- (35) The Netherlands advised that in view of these difficulties the decision of the municipality to waive a loan and to compensate FC Den Bosch for the vacation of the training complex used by it was subordinated to a number of conditions set out in the restructuring plan agreed between the municipality, the other creditors and FC Den Bosch.
- (36) The restructuring plan entailed a new legal structure for FC Den Bosch. It was transformed from a club into a limited company (*naamloze vennootschap* (NV)), cuts in staff and in the group of players. It foresaw that the number of contract players is reduced to the minimum imposed by the KNVB of 16. FC Den Bosch will not buy players on the transfer market but only contract freely transferable players. This entailed a reduction of cost of personnel and players of 17 %.
- (37) As set out in recital 22, the creditors of FC Den Bosch waived debts of altogether EUR 5,337 million for equity. Furthermore the municipality compensated the club for leaving the training complex it had used so far with an amount of EUR 1,4 million. With these measures, the negative equity of the club was turned into a moderate positive equity of EUR 0,63 million which allowed its transformation in a limited company.
- (38) The plan was designed to lead to a stable financial position over a period of 3 years. It foresaw decreasing losses in the financial year 2011/2012 and 2012/2013 and a small profit of EUR 0,1 million for the financial year 2013/2014. This wouldn't leave room for FC Den Bosch to acquire transfer players. In fact, FC Den Bosch was able to realise in the accounting year 2011/2012 a moderate profit of EUR 0,103 million, also due to better than predicted sponsoring contracts.

#### 4. ASSESSMENT OF THE MEASURES

##### 4.1. Presence of State aid according to Article 107(1) of the Treaty

- (39) According to Article 107(1) of the Treaty, State aid is aid awarded by a Member State or through State resources in any form whatsoever, which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. The conditions laid down in Article 107(1) of the Treaty are cumulative and therefore for a measure to be qualified as State aid all the conditions must be fulfilled.
- (40) On the basis of the opening decision, the Commission will assess the decision of the municipality of 21 June 2011 to waive a subordinated claim of EUR 1,65 million on FC Den Bosch and to compensate FC Den Bosch with EUR 1,4 million for leaving its training facilities. The Commission notes that both actions were presented together and were decided in the same meeting of the municipal council and that they are closely linked as regards their purpose and the situation of FC Den Bosch at the time.
- (41) Consequently, these two measures should be assessed together <sup>(9)</sup>. In the present case, however, it is clear from the assessment which follows that both measures constitute State aid when considered separately. This necessarily implies that the measures also constitute State aid when assessed together as a single measure.

###### 4.1.1. Use of State resources

- (42) Both measures were decided by the municipality and they have financial consequences for this municipality amounting to EUR 3,1 million. They thus involve the use of State resources and are imputable to the State. The transfer of State resources may take many forms, such as direct grants, loans, guarantees, direct investment in the capital of enterprises and benefits in kind. Waiving claims of the State also constitutes a transfer of State resources.

###### 4.1.2. Selective advantage for FC Den Bosch

- (43) Whenever the financial situation of an undertaking is improved as a result of State intervention, an advantage is present. To assess this, the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been introduced. It is undisputed that FC Den Bosch's difficult financial situation improved markedly through the measures under investigation.

<sup>(9)</sup> Case T-11/95 *BP Chemicals v Commission* EU:T:1998:199, paragraphs 170 ff; Case C-399/10 P and C-401/10 P *Bouygues and Bouygues Télécom v Commission and Others* EU:C:2013:175, paragraphs 103-104; and Case T-1/12 *France v Commission* EU:T:2015:17, paragraph 37.

- (44) An advantage, within the meaning of Article 107(1) of the Treaty, is any economic benefit which an undertaking would not have obtained under normal market conditions <sup>(10)</sup>, i.e. in the absence of State intervention which is not guided by commercial principles.
- (45) The Netherlands claims that the improvement of the financial situation of FC Den Bosch is the result of market conform transactions and therefore not undue. According to the Netherlands, the municipality acted in compliance with the *market economy investor principle* (hereinafter: 'MEIP').

#### 4.1.2.1. The waiver of the subordinated claim

- (46) As set out above, the decision to waive the subordinated claim of EUR 1,65 million involves a debt-to-equity swap, followed by a transfer of the resulting claim for equity for EUR 1.
- (47) It therefore first needs to be determined whether a private creditor would have swapped debts for equity in the same way as the municipality. In the case of an undertaking that fulfils the conditions for bankruptcy, a private creditor has two options. It may proceed to the liquidation of the undertaking with a view to recover at least a part of its loan, or it may convert the loan in shares to allow the undertaking to continue operating, with a perspective to become profitable again, so that the shares increase their value. If private creditors acted in the same way as the municipality, and for a significant part of the debts of FC Den Bosch, one could assume that the behaviour of the municipality follows the MEIP.
- (48) Respect of the MEIP may be established where a transaction is carried out under the same terms and conditions (and therefore with the same level of risk and rewards) and at the same time by public bodies and private operators who are in a comparable situation (a *pari passu* transaction). In this case it can normally be inferred that such a transaction is in line with market conditions <sup>(11)</sup>. It is also of importance whether the intervention of the private operators has real economic significance and is not merely symbolic or marginal <sup>(12)</sup> and whether the starting position of the public entities and the private operators involved is comparable with regard to the transaction. On the other hand, if public bodies and private operators who are in a comparable situation take part in the same transaction at the same time but under different terms or conditions, this normally indicates that the intervention of the public body is not in line with market conditions.
- (49) In the case under consideration, the starting position of the public entities and the private operators involved was comparable with regard to the transaction. All creditors involved in the transaction held unsecured and non-recoverable loans. The private sector involvement was also significant. However, the other operators are not simple market operators, as already pointed out; it seems all of them are linked in one way or another to the club. Hence it cannot be assumed that they acted with a view to making a profit; supporters for instance are not rational market operators seeking profit.
- (50) It is also apparent that the transaction took place under different terms or conditions. The municipality asked for more in return to its debt waiver than the other creditors. It received, as shown in Table 2, with one share per EUR 26,7 relatively more shares than all other commercial or non-profit creditors. Furthermore, the debt restructuring enabled FC Den Bosch to pay stadium rent arrears to the stadium operating company BIM which is owned by the municipality. On the other hand, the creditor [...] received preferential shares which may give it a priority to receive possible later dividends. This means that it is not excluded that at least one private actor obtained better conditions than the municipality. The evidence does not allow the conclusion that the municipality acted *pari passu* with market economy operators in agreeing to the swap.
- (51) It is also unlikely that a private investor would have agreed to sell its non-recoverable loan which is swapped into equity for a price of EUR 1 to a foundation which plans to sell certificates for these shares for EUR 100 per share. By not keeping the shares, the municipality rid itself of the only commercial reason for a debt equity swap,

<sup>(10)</sup> Case C-39/94 *SFEI and Others*, ECLI:EU:C:1996:285, point 60; Case C-342/96 *Spain v Commission*, ECLI:EU:C:1999:210, point 41.

<sup>(11)</sup> See, in that regard, Case T-296/97 *Alitalia v Commission*, ECLI:EU:T:2000:289, point 81.

<sup>(12)</sup> For instance, in the *Citynet Amsterdam* case, the Commission considered that two private operators taking up one-third of the total equity investments in a company (considering also the overall shareholding structure and that their shares are sufficient to form a blocking minority regarding any strategic decision of the company) could be considered economically significant (see Commission Decision 2008/729/EC of 11 December 2007 on the State aid Case C53/06 (ex N 262/05, ex CP 127/04), investment by the city of Amsterdam in a fibre-to-the-home (FttH) network (OJ L 247, 16.9.2008, p. 27), recitals 96-100).

the — although distant — hope or expectation to see the shares assume value. It gave a third party the opportunity to collect funds by selling share certificates instead of doing it itself or at least requiring to have a share in the sales income <sup>(13)</sup>. In that case the State kept its shares and could reasonably expect a profit in the future.

- (52) Therefore, the waiver of the subordinated debt cannot be likened to the behaviour of a rational market operator and it conferred an advantage to FC Den Bosch which it could not have obtained on market terms.

#### 4.1.2.2. The acquisition of the training complex

- (53) Regarding the training complex, the Netherlands claims that the compensation of EUR 1,4 million was calculated in line with the land sales Communication and Commission decisions regarding the compensation of replacement cost and, hence, did not provide an advantage to FC Den Bosch. According to that Communication, a sale of land and buildings by a public authority does not constitute aid, first, where the public authority accepts the highest or only bid following an unconditional bidding procedure and, second, where in the absence of such a bidding procedure the sales price is set at least at the value established by an independent expert evaluation.
- (54) The guidance provided by the land sales Communication, as stated in its introduction, only ‘concerns sales of publicly owned land and buildings. It does not concern the public acquisition of land and buildings or the letting or leasing of land and buildings by public authorities. Such transactions may also include State aid elements.’
- (55) In any case, the mechanisms set out in the land sales Communication are only tools to establish whether the State acted as a market economy investor and are therefore specific examples for the application of the MEIP test to land transactions between public and private entities <sup>(14)</sup>. It is therefore not relevant if the assessment of the land evaluation and acquisition is made under the land sales Communication or without reference to it.
- (56) In the case of the sport complex that FC Den Bosch liberated, the land valuation, exercised by an independent expert, was based on the adjusted replacement value. According to the explanations of the Netherlands, this is the value the State would have to pay in case of the relocation of the owner, based on the legal rules for evaluating property subject to an uncontested expropriation exercise. This is not convincing. The buildings and installations of the complex, which were constructed by FC Den Bosch, were already the property of the municipality. FC Den Bosch used them without a long leasehold. The valuation should therefore not have taken place on the basis of a scenario where FC Den Bosch would have been the owner of the buildings. Moreover, the adjusted replacement value may well differ from the market value of an asset.
- (57) It also does not appear that the municipality had specific plans for that land at the moment of the transaction. The transaction was clearly a part of the restructuring measures decided by the municipality and had the apparent principal objective to provide FC Den Bosch with liquidity. It is unlikely that the municipality would have entered into this exercise at that point in time without that objective. It could also be argued that with the disappearance of the football club in case of bankruptcy the sport complex would have been liberated without any indemnity.
- (58) Therefore it has to be doubted that another market operator could have convinced the municipality to disburse EUR 1,4 million to liberate a property for which this operator did not even have a long leasehold. In any case the amount would have been much lower.

#### 4.1.2.3. Conclusion on the existence of a selective advantage

- (59) The measures therefore confer a selective advantage on FC Den Bosch within the meaning of Article 107(1) of the Treaty.

<sup>(13)</sup> Therefore the debt waiver by the municipality cannot be compared with the decision of the Commission concerning the Belgian company Sonaca in Case SA.35131 (2013/N).

<sup>(14)</sup> According to this test, no State aid would be involved where, in similar circumstances, a private investor, operating in normal market conditions in a market economy, could have been prompted to provide to the beneficiary the measures in question.

#### 4.1.3. Effect on trade and competition

- (60) The Netherlands has questioned the impact of possible aid on the internal market for clubs not playing football at European level. However, professional football clubs are considered to be undertakings and are subject to State aid control. Professional football offers gainful employment and provides services for remuneration; it has developed a high level of professionalism and thereby increased its economic impact <sup>(15)</sup>.
- (61) Although FC Den Bosch does not participate in football competitions which have an international dimension, as a professional football club it deploys economic activities in several other markets, such as the transfer market for professional players, publicity, sponsorship, merchandising or media coverage. Aid to a professional football club strengthens its position on each of those markets, most of which cover several Member States. Therefore, if State resources are used to provide a selective advantage to a professional football club, regardless of the league in which it plays, such aid is likely to have the potential of distorting competition and to affect trade between Member States within the meaning of Article 107(1) of the Treaty <sup>(16)</sup>.

#### 4.2. Assessment under Article 107(3)(c) of the Treaty

- (62) The Commission must assess whether the aid measure in favour of FC Den Bosch can be considered to be compatible with the internal market. None of the derogations mentioned in Article 107(2) of the Treaty applies to the aid measure in question. As regards the derogations provided for in Article 107(3) of the Treaty, the Commission notes that none of the Dutch regions falls under the derogation in Article 107(3)(a) of the Treaty. The aid measure in question does not promote an important project of common European interest, nor does it serve to remedy any serious disturbance in the Dutch economy within the meaning of Article 107(3)(b) of the Treaty. The aid measure can also not be said to promote culture or heritage conservation within the meaning of Article 107(3)(d) of the Treaty.

##### 4.2.1. Applicable guidelines

- (63) As regards the derogation in Article 107(3)(c) of the Treaty in favour of aid to facilitate the development of certain economic activities, such aid could be compatible where it does not adversely affect trading conditions to an extent contrary to the common interest.
- (64) For its assessment of aid measures under Article 107(3)(c) of the Treaty, the Commission has issued a number of Regulations, Frameworks, Guidelines and Communications concerning aid forms and horizontal or sector purposes for which aid is awarded. Given that FC Den Bosch faced financial difficulties at the time the measures were taken and that the aid was awarded by the municipality to address those difficulties, it is appropriate to assess whether the criteria laid down in the Guidelines <sup>(17)</sup> apply and are fulfilled.
- (65) In July 2014, the Commission published new Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty <sup>(18)</sup>. They are, however, not applicable to this non-notified aid granted in 2011. According to point 137 of the new guidelines, this would only be the case for any rescue or restructuring aid granted without prior authorisation if some or all of the aid is granted after the publication of those guidelines in the *Official Journal of the European Union*. According to point 138 of the new guidelines, in all other cases the Commission will conduct the examination on the basis of the guidelines which applied at the time the aid was granted, and therefore, in the present case, those applicable before 2014.

<sup>(15)</sup> Case C-325/08 *Olympique Lyonnais* ECLI:EU:C:2010:143, points 27 and 28; Case C-519/04 P *Meca-Medina and Majcen v Commission* ECLI:EU:C:2006:492, point 22; Case C-415/93 *Bosman* ECLI:EU:C:1995:463, point 73.

<sup>(16)</sup> Commission Decisions regarding Germany of 20 March 2013 on *Multifunktionsarena der Stadt Erfurt* (Case SA.35135 (2012/N)), point 12, and *Multifunktionsarena der Stadt Jena* (Case SA.35440 (2012/N)), summary notices in OJ C 140, 18.5.2013, p. 1, and of 2 October 2013 on *Fußballstadion Chemnitz* (Case SA.36105 (2013/N)), summary notice in OJ C 50, 21.2.2014, p. 1, points 12-14; Commission Decisions regarding Spain of 18 December 2013 on possible State aid to four Spanish professional football clubs (Case SA.29769 (2013/C)), point 28, Real Madrid CF (Case SA.33754 (2013/C)), point 20, and alleged aid in favour of three Valencia football clubs (Case SA.36387 (2013/C)), point 16, published in OJ C 69, 7.3.2014, p. 99.

<sup>(17)</sup> See recital 15 and footnote 5.

<sup>(18)</sup> Communication from the Commission — Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (OJ C 249, 31.7.2014, p. 1).

#### 4.2.2. FC Den Bosch as company in difficulty

- (66) According to point 11 of the Guidelines, a company may be considered to be in difficulty where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, or mounting debt. As set out in recital 8, several of these signs are present for FC Den Bosch. Therefore it was a company in difficulty and the compatibility of the State aid will be assessed under the Guidelines.

#### 4.2.3. Restoration of long term viability

- (67) In section 3.2, the Guidelines require that the grant of the aid must be conditional on the implementation of a restructuring plan. As pointed out in recital 7, FC Den Bosch qualifies as small enterprise. According to point 59 of the Guidelines, the Commission notes that the Netherlands has communicated a restructuring plan which addresses the conditions set out in points 34 to 37 of the Guidelines.
- (68) In this regard, the Commission notes that the decision of the municipality to waive its loan to FC Den Bosch and pay it for liberating its sport complex followed an analysis on the nature and the causes of the difficulties of FC Den Bosch. The grant was subordinated to a number of conditions which aim at restoring the long-term viability of the firm within a reasonable time-scale of 3 years and at meeting the requirements of the KNVB to continue licensing FC Den Bosch for professional competitions. The restructuring plan entailed a new management, cuts in staff and in the group of players. It covers the abandonment of a large training complex. Thus FC Den Bosch envisages savings on its core activity. The restructuring plan does not rely on external factors which FC Den Bosch can pursue but not entirely control, such as finding new sponsors and an increase in the number of spectators. The continued improvement of the financial situation of the club is envisaged as well as its continued operation as a professional football club. The development as set out in recital 35 shows that the plan was indeed realistic.

#### 4.2.4. Compensatory measures

- (69) Points 38 to 42 of the Guidelines require that compensatory measures be taken by the beneficiary in order to minimise the distortive effect of the aid and its adverse effects on trading conditions. However, this condition does not apply to small enterprises. As set out in recital 7, FC Den Bosch is a small enterprise.

#### 4.2.5. Aid limited to a minimum

- (70) The Commission also notes that the restructuring plan is to a considerable extent financed by external private entities in addition to the internal savings made, in accordance with points 43 and 44 of the Guidelines. Several private entities had agreed to waive their debts as well. The overall contribution of the creditors and the municipality to the refinancing of FC Den Bosch was EUR 6,737 million (EUR 5,337 million of waived debts plus EUR 1,4 million for the training complex, if the entire amount for the training complex would be counted as aid). The 25 % of own contribution required for small enterprises would be EUR 1,685 maximum. Other entities than the State contributed EUR 3,687 million in the form of waiving their debts (EUR 5,337 million minus the municipality's loan of EUR 1,65 million), among them one commercial undertaking an amount of EUR 1,865 million, which is more than the required 25 %.
- (71) The amount of the aid was necessary. According to the restructuring plan it should lead to smaller losses in the 2011/2012 and 2012/2013 seasons and moderate positive result later. This would not have allowed FC Den Bosch to buy new players or attract them with higher salaries.

#### 4.2.6. Monitoring and annual report

- (72) Point 49 of the Guidelines requires that the Member State communicates on the proper implementation of the restructuring plan through regular detailed reports. Point 51 sets out less stringent conditions for SMEs, where the transmission of yearly copies of the balance sheet and profit-and-loss accounts is normally considered sufficient. The Netherlands has committed to submit these reports.

#### 4.2.7. *One time, last time*

- (73) In accordance with points 72 to 77 of the Guidelines, the Netherlands specified that FC Den Bosch did not receive rescue or restructuring aid in the 10 years before the grant of the present aid. It also committed not to award any new rescue or restructuring aid to FC Den Bosch during a period of 10 years.

#### 4.3. **Conclusion**

- (74) The Commission therefore concludes that the debt restructuring measures regarding FC Den Bosch constitute State aid within the meaning of Article 107(1) of the Treaty. However, the restructuring aid granted by the municipality to FC Den Bosch fulfils the conditions of the Guidelines and does therefore not adversely affect trading conditions to an extent contrary to the common interest. Therefore, the aid is compatible with Article 107(3)(c) of the Treaty.

#### 5. **CONCLUSION**

- (75) The Commission finds that the Netherlands has unlawfully implemented the aid to FC Den Bosch in breach of Article 108(3) of the Treaty. However, the State aid awarded to FC Den Bosch in 2011 amounting to EUR 1,65 million in form of a debt waiver and of EUR 1,4 million paid in consideration for leaving its training complex meets the conditions for restructuring aid in the Guidelines and can be considered compatible with the internal market in accordance with Article 107(3)(c) of the Treaty,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The State aid which the Netherlands has implemented in favour of the football club FC Den Bosch in 's-Hertogenbosch, amounting to EUR 3,05 million, is compatible with the internal market within the meaning of Article 107(3)(c) of the Treaty on the Functioning of the European Union.

#### *Article 2*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 4 July 2016.

*For the Commission*  
Margrethe VESTAGER  
*Member of the Commission*